

# The Proposed 207 Regulations: Overview and Highlights

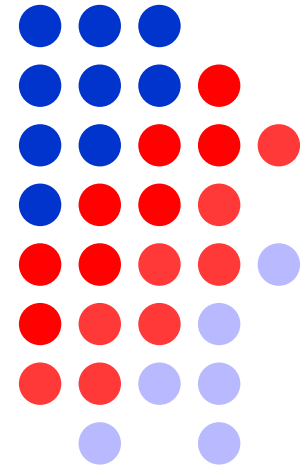
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**Marilyn Glynn**

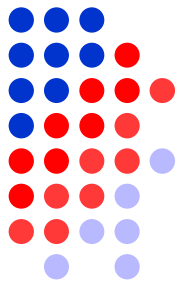
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# 1. History



1962: Section 207 first enacted; no regulations

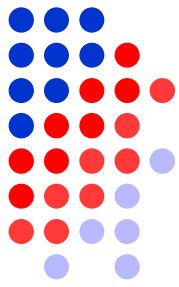
1978-80: Ethics in Government Act amendments; post-EIGA 207 regulations, 5 CFR Part 2637 (formerly Part 737)

1989: Ethics Reform Act amendments

1991: Limited interim regulations at 5 C.F.R. Part 2641

2003: Comprehensive Part 2641 proposed

# 2. Structure of Proposed Rule



## Subpart A—General

Provisions on the purpose and applicability of the rule, enforcement, ethics advice, and definitions

Revocation of Part 2637

## Subpart B—Prohibitions

Heart of regulation: six sections--discussing each prohibition affecting executive branch

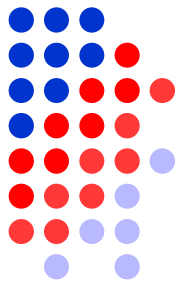
Structure of each section:

- (a) Basic statement of prohibition
- (b) All applicable exceptions/waivers
- (c) Commencement and length of prohibition
- (d) Elements of the prohibition

## Subpart C—Exceptions, Waivers, and Component Designations

Guidance on statutory provisions permitting relief from prohibitions

## 2. Structure of Proposed Rule (cont.)



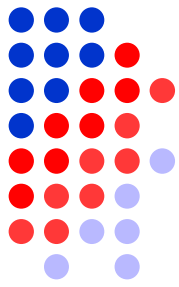
### Appendix A—Positions Exempted by OGE from the Requirements of 207(c) and 207(f)

List of positions already exempted by OGE under 207(c)(2)(C)

### Appendix B—Separate Agency Components Designated by OGE for purposes of 207(c)

List of separate agency component designations already approved by OGE under 207(h)

# 3. Highlights of Subpart B



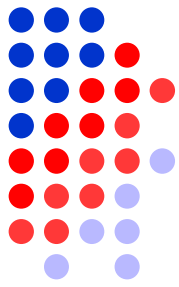
## 2641.201–Permanent Restriction

Explains section 207(a)(1)

Also sets out many elements common to other prohibitions

- 1) Communication or appearance – contact vs. behind-the-scenes
- 2) Intent to influence–Seeking discretionary government action, or seeking to affect government action in connection with an issue or aspect of a matter which involves the potential for dispute
- 3) To or before an Employee of the U.S.– directed to and received by an employee of the government
- 4) On behalf of another person – consent and control by another
- 5) Particular matter involving specific parties – versus matters of general applicability; the “same” particular matter
- 6) Personal and substantial participation
- 7) U.S. is party or has direct and substantial interest–procedures and standards for determining

### 3. Highlights of Subpart B (cont.)



#### 2641.202—Two Year Restriction for Matters under Official Responsibility

Explains 207(a)(2)

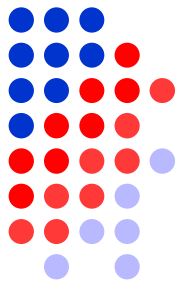
Many cross-references to elements in 2641.201— elements in common with permanent restriction

Guidance focuses on what it means for a matter to be pending under employee's official responsibility

Issue of official responsibility for temporary duties: “caretaker” vs. “full authority”

Effect of recusal, leave status

### 3. Highlights of Subpart B (cont.)

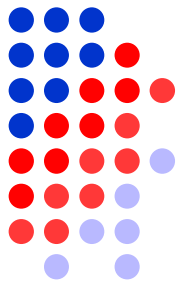


2641.203–Trade and Treaty Negotiations

207(b)

Mainly tracks statutory language—reserves for future rulemaking

# 3. Highlights of Subpart B (cont.)



## 2641.204–Senior Employee Cooling-off Period

Explains 207(c)

Definition of “senior employee” is in subpart A –section 2641.104.

Details to senior position–change to interim rule provision: no longer covered

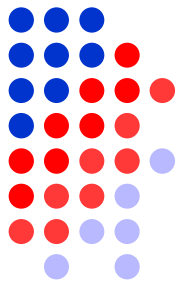
Applicability to SGEs and IPAs–SGE basic pay formula; IPA cost sharing implications

Effect of organizational changes–2641.204(g)(2)(iv); see also 2641.302(g).

“Matter” broader than “particular matter” or “particular matter involving specific parties”– 2641.204(i)(2)



### 3. Highlights of Subpart B (cont.)



#### 2641.205—Very Senior Employee Cooling-off Period

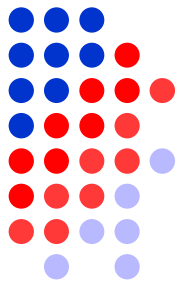
Explains 207(d)

Definition of very senior employee—2641.104

Details to very senior position—change to interim rule provision:  
no longer covered

Contacts with executive schedule officials—can include contacts with subordinates, if intent that information will be conveyed directly with attribution, 2641.205(g) & Example 5

### 3. Highlights of Subpart B (cont.)



2641.206—One-year Restriction on Representing, Aiding, or Advising a Foreign Entity

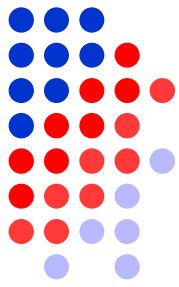
207(f)

Mainly tracks statutory language—reserves for future rulemaking

Reference to Foreign Agents Registration Act

Limit on use of exemption for acting on behalf of US  
—see 2641.206(b)(1)

# 4. Highlights of Subpart C



## 2641.301(a)–Acting on Behalf of US

Combines two things:

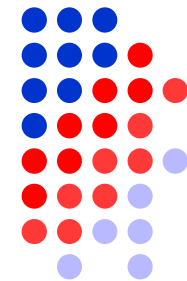
- (1) exception in 207(j)(1) for acts done in carrying out official duties on behalf of US;
- (2) various parenthetical phrases in most prohibitions excluding representation on behalf of US

Only distinction: 207(j)(1) requires Federal employee status, whereas parenthetical exclusions do not; distinction generally does not matter, except for 207(f)

Scope of exclusion where not Federal employee – (1) specific agreement to provide representational services to US involving fiduciary duty; or (2) former employee called by the United States to testify at Congressional hearing.

Not sufficient: government may derive some benefit; government initiated the contact; former employee performing work funded by government

## 4. Highlights of Subpart C (cont.)



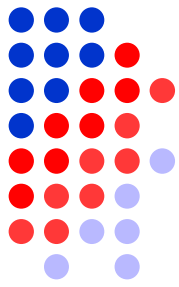
### 2641.301(e)—Scientific and Technological Information

Explains 207(j)(5)

Two alternatives: (1) individual certifications; (2) compliance with agency procedures

Certification provision narrower than pre-1989 law and regulations:  
now all contact must be solely for purpose of furnishing scientific or technological information

## 4. Highlights of Subpart C (cont.)



### 2641.301(f)–Testimony under Oath and Statements under Penalty of Perjury

Explains 207(j)(6)

New treatment of expert testimony–differs from pre-1989 law and regulations:  
expert testimony permitted except under lifetime ban

Expert testimony permitted under lifetime ban if court order–but mere subpoena  
not sufficient

### 2641.301(g)–Contacts on Behalf of Certain Political Entities

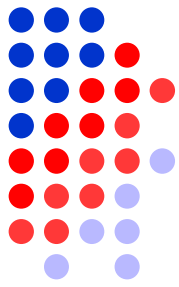
Explains 207(j)(7)–largely follows statute

### 2641.301(h)–International Organizations

Explains 207(j)(3)

Statutory exception did not exist pre-1989, but old regulations had provision at  
2637.310; old regulatory provision superseded by statute–see OGE 91 x 29.

## 4. Highlights of Subpart C (cont.)



### 2641.301(j)–Exemption of Specific Positions from 207(c) and 207(f)

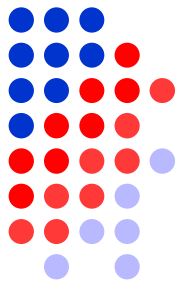
Implements and explains 207(c)(2)(C)

New OGE authority in 1989 to exempt specific positions from the senior employee prohibition in 207(c) (and necessarily also 207(f))

1991 interim rule set out initial procedures for implementing has been used occasionally

Proposed rule gives more guidance, especially on undue hardship element

## 4. Highlights of Subpart C (cont.)



### Section 2641.302—Component Designations for 207(c)

Implements and explains 207(h)

1991 interim rule set out initial procedures for designating separate agency components for senior employee cooling-off period

Proposed change: new designations would apply to senior employees who already terminated

Proposed rule provides additional factors indicating component is actually separate and distinct